Peh Lai Huat v MBf Finance Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–356 OF 2002
GOPAL SRI RAM, ABDUL AZIZ MOHAMAD AND MOHD GHAZALI JJCA
30 APRIL 2009

Land Law — Charge — Enforcement of — Action by chargee to foreclose charged property — Loan remaining inactive for more than six years — Whether foreclosure proceedings barred by limitation — Whether right of foreclosure only to arise upon default of Form 16D notice — Whether limitation period of 12 years applicable — Limitation Act 1953 s 21(2)

Limitation — Charge — Action by chargee to foreclose charged property — Loan remaining inactive for more than six years — Whether foreclosure proceedings barred by limitation — Right of foreclosure only to arise upon default of Form 16D notice — Limitation period of 12 years applicable — Limitation Act 1953 s 21(2)

In 1984, the respondent's predecessor in title lent a sum of about RM300,000 to the appellant. The loan was secured by a charge over the appellant's land. The last repayment that the appellant made towards that loan was on 28 January 1986. By a notice dated 17 August 2000 in Form 16D of the National Land Code ('the Code'), the respondent made demand of the loan and accrued interest. Nothing was forthcoming from the appellant and the respondent applied under s 256 of the Code for an order for sale of the subject land. The appellant's counsel submitted that there was a 'cause to the contrary' within the meaning of s 256(3) of the Code against the making of the order for sale because the respondent's action was barred by limitation. He relied on s 21(1) of the Limitation Act 1953 ('the Act'). According to the appellant, the foreclosure proceedings were barred by limitation since the loan had remained inactive for more than six years and the respondent had taken no proceedings to recover the same. The High Court ruled against the appellant and hence this appeal.

Held, dismissing the appeal:

(1) (per **Gopal Sri Ram JCA**) The cause of action here, that is to say, the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16D notice. The originating summons was filed on 6 April 2001, well within the 12 year period prescribed by s 21(2) of the Act (see para 4).

(2) (per **Gopal Sri Ram JCA**) Although s 21 of the Act speaks of a 'mortgage', which is a type of security that the Code does not recognise, nevertheless s 21 is the relevant and applicable law (see para 5); *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 referred.

(3) (per **Abdul Aziz Mohamad JCA**) Section 21(1) of the Act did not apply to the respondent's action because it was not an action brought to recover any principal sum of money secured by a charge but was an action in exercise of the right to the statutory remedy of an order for sale (see para 12).

[Bahasa Malaysia summary

Pada 1984, pendulu responden dalam hak milik telah meminjamkan RM300,000 kepada perayu. Pinjaman tersebut telah dijamin oleh gadaian ke atas tanah perayu. Pembayaran balik terakhir yang dibuat oleh perayu bagi pinjaman tersebut adalah pada 28 Januari 1986. Melalui notis bertarikh 17 Ogos 2000 di dalam Borang 16D Kanun Tanah Negara ('Kanun'), responden telah membuat permintaan untuk pinjaman dan faedah terakru. Tiada apa-apa yang diterima daripada perayu dan responden telah memohon perintah jualan tanah tersebut di bawah s 256 Kanun. Peguam perayu berhujah bahawa terdapat 'cause to the contrary' dalam maksud s 256(3) Kanun terhadap membuat perintah jualan oleh kerana tindakan responden dihalang oleh had masa. Dia bersandarkan kepada s 21(1) Akta Had Masa 1953 ('Akta'). Menurut perayu, prosiding halang tebus telah dihalang oleh had masa memandangkan pinjaman tersebut tidak aktif untuk lebih daripada enam tahun dan responden tidak mengambil sebarang prosiding untuk mendapatkan semula tanah tersebut. Mahkamah Tinggi memutuskan terhadap perayu dan justeru rayuan ini.

Diputuskan, menolak rayuan:

(1) (oleh **Gopal Sri Ram HMR**) Kausa tindakan di sini, iaitu, hak untuk melaksanakan remedi statutori bagi perintah jualan tidak timbul selepas perayu telah gagal untuk meremedi kemungkiran yang dinyatakan di dalam notis Borang 16D. Saman pemula yang difailkan pada 6 April 2001, adalah dalam tempoh 12 tahun yang diperuntukkan s 21(2) Akta (lihat perenggan 4).

(2) (oleh **Gopal Sri Ram HMR**) Meskipun s 21 Akta menyebut tentang 'mortgage', iaitu sejenis sekuriti yang tidak diiktiraf oleh Kanun, tetapi s 21 adalah undang-undang yang relevan dan digunapakai (lihat perenggan 5); *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 dirujuk.

(3) (oleh **Abdul Aziz Mohamad JCA**) Seksyen 21(1) Akta tidak terpakai untuk tindakan responden oleh kerana ia bukanlah tindakan yang dibuat

untuk mendapatkan sebarang amaun wang pokok yang dijamin oleh gadaian tetapi merupakan tindakan dalam melaksanakan hak remedi statutori bagi perintah jualan (lihat perenggan 12).]

Notes

For cases on charge generally, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2181–2194.

For cases on enforcement of charges, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2534–2541.

Cases referred to

American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd [1973] 1 MLJ 95, FC (refd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266, FC (refd)

Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd [1988] 1 MLJ 257, SC (refd)

Legislation referred to

Limitation Act 1953 s 21, 21(1), (2)
National Land Code s 256, s 256(3), Form 16D

Appeal from: Originating Summons No S2–24–1105 of 2001 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (CY Ngeow & Associates) for the appellant.
Brian Foong Mun Loong (Cheang & Arif) for the respondent.

Gopal Sri Ram FCJ:

[1] The only issue in this case is whether the respondent's application for an order for sale is barred by limitation. The facts — about which there is no dispute — are as follows.

[2] In 1984, the respondent's predecessor in title lent a sum of about RM300,000 to the appellant. The loan was secured by a charge over the appellant's land. The last repayment that the appellant made towards that loan was as long ago as 28 January 1986. By a notice dated 17 August 2000 in Form 16D of the National Land Code ('the Code'), the respondent made demand of the loan and accrued interest. Nothing was forthcoming from the appellant. So, the respondent took out an application under s 256 of the Code seeking an order for sale of the subject land. It is the appellant's case that the foreclosure proceedings are barred by limitation since the loan had remained inactive for

more than six years and the respondent had taken no proceedings to recover the same. The High Court ruled against the appellant and he appealed to this court which dismissed the appeal.

[3] In my judgment the appellant overlooks a point that is central to this case. He has treated the respondent's application to have the subject land sold in public auction as an action to recover the debt owed. That it certainly is not. The true nature of such a proceeding was described by Seah SCJ in *Malaysian International Merchant Bankers Bhd v Dhanoa Sdn Bhd* [1988] 1 MLJ 257 as follows:

> The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code. The appellant's claim was not under a covenant but under the registered charge.

American International Assurance Co Ltd v Union Builders (Malaysia) Sdn Bhd [1973] 1 MLJ 95, was prayed in aid of this conclusion. In that case, Ong CJ (Malaya) said:

> The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest.

Accordingly, s 21(1) of the Limitation Act 1953 which provides that: '(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued' has no application to this case. The proceeding in the court below was not — to quote the words of the subsection — 'an action … brought to recover any principal sum of money secured by a mortgage.'

[4] Similarly, s 21(2) of the Limitation Act which reads:

> (2) No foreclosure action in respect of mortgaged personal property shall be brought after the expiration of twelve years from the date on which the right to foreclose accrued:
>
> Provided that if, after that date the mortgagee was in possession of the mortgaged property, the right to foreclose on the property which was in his possession shall not, for the purposes of this subsection, be deemed to have accrued until the date on which his possession discontinued.

also has no application to this case. That is because the cause of action here, that is to say, the right to exercise the statutory remedy of an order for sale did not

arise until after the appellant had failed to remedy the default specified in the Form 16D notice. The originating summons was here filed on 6 April 2001, well within the 12 year period prescribed by s 21(2) of the Limitation Act.

[5] I have in this judgment, referred to s 21 of the Limitation Act. That section speaks of a 'mortgage', which is a type of security that the Code does not recognise. However, in *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, the former Federal Court speaking through Salleh Abas CJ (Malaya) held that: 'when s 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code.' It is precisely for that reason that s 21 is the relevant and applicable law.

[6] In view of the foregoing this appeal was devoid of merit and was dismissed and the usual orders consequent upon a dismissal were made.

[7] My learned brother Mohd Ghazali bin Mohd Yusoff JCA (now FCJ) has seen this judgment in draft and has expressed his agreement with it.

Abdul Aziz Mohamad FCJ:

[8] In 1984 the respondent bank's predecessor granted to the appellant a loan of RM300,000 which was secured by a charge over the appellant's land. The appellant defaulted in making repayment after the last repayment on 28 January 1986. On 6 April 2001 the respondent applied for an order for sale of the land under s 256 of the National Land Code. The order for sale was granted by the High Court on 10 May 1992. This was an appeal from that order.

[9] The only issue that was raised before us was the issue of limitation. The appellant's counsel submitted that there was a 'cause to the contrary' within the meaning of s 256(3) against the making of the order for sale because the respondent's action was barred by limitation. He relied on s 21(1) of the Limitation Act 1953. He took the stand that the respondent's action was an action to recover the principal sum of money secured by the charge. As far as relevant to that stand, s 21(1) provides as follows:

> (1) No action shall be brought to recover any principal sum of money secured by a … charge on land … after the expiration of twelve years from the date when the right to receive the money accrued.

[10] Counsel argued that failure to make the next repayment on 28 February 1986 was a default and that, according to cl 12 of the annexure to the charge,

such a default gave the respondent-chargee a right of action. Therefore, counsel argued, to avoid the prohibition of s 21(1) the action should have been brought by February 1998, since the right of action accrued in February 1986, whereas it was only brought on 6 April 2001.

[11] We dismissed the appeal without hearing the respondent's counsel.

[12] The only reason why I decided that the appeal should be dismissed was the reason that is stated in para 3 of the judgment of my learned brother Gopal Sri Ram FCJ, that is, that s 21(1) of the Limitation Act 1953 did not apply to the respondent's action because it was not an action brought to recover any principal sum of money secured by a charge but was an action in exercise of the right to the statutory remedy of an order for sale. It was, however, not with the benefit of having read the two authorities cited by my learned brother in the said paragraph that I conceived that reason.

[13] I have, however, to state, after currently perusing the respondent's written outline submission that was available at the hearing of the appeal, that that was not the stand of the respondent. The outline submission indicates that the respondent accepted that s 21(1) applied, but, disputing the appellant's accrual date 28 February 1986 and contending instead for an accrual date one month after a Form 16D notice of 12 December 2000, maintained that the action was brought within the twelve years. But as I said, the only reason for my decision was that s 21(1) did not apply.

Appeal dismissed.

Reported by Kanesh Sundrum